Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
and	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association ("USTA") hereby files its comments in response to the Commission's *Second Further NPRM* in CC Docket No. 98-147, and *Fifth Further NPRM* in CC Docket No. 96-98.[1] Both NPRMs raise the specter of increased Commission regulation of advanced services deployment and local competition. USTA urges the Commission to refrain from imposing burdensome regulations on ILECs. Such regulations merely penalizes ILECs, forestalls competition for advanced services, while placing reliance on government regulations in palce of market competition.

[1] *Order on Reconsideration and Second Further Notice of Proposed Rulemaking* in CC Docket No. 98-147, and *Fifth Further Notice of Proposed Rulemaking* in CC Docket No. 96-98, released August 10, 2000.

SECOND FURTHER NOTICE NPRM
COLLOCATION AND ADVANCED SERVICES DEPLOYMENT

Section 251 (c)(6) limits physical collocation to "equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier."[2] The Commission' however, defined the term "necessary" to include equipment that is "used or useful" for interconnection or access to UNEs regardless of whether the piece of equipment was actually necessary for such purposes.[3] In addition, the Commission required ILECs to permit competitors to cross-connect CLEC facilities, which ignored the fact that collocation of equipment required for cross-connection of CLEC facilities was not necessary for access to ILEC interconnection and UNEs.[4] Moreover, the Commission required ILECs to permit competitors to collocate their equipment "Subject only to technical feasibility and permissible security parameters ... in any unused space in the incumbent LEC's premises, without requiring the construction of a room, cage, or similar structure, and without requiring the creation of a separate entrance to the competitor's collocation space."[5]

The Commission seeks comments on "whether the definition of "necessary" under section 251(c)(6) should instead require that an incumbent LEC permit physical collocation of equipment having additional capabilities."[6] In addition, the Commission asks whether "Congress intended to restrict collocators to deployment of equipment that can only be used for interconnection or access to unbundled network elements even if

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2 47 U.S.C. §251 (c)(6).

3 *Advanced Services Collocation Order*, 14 FCC Rcd at 4778-79.

4 *Id.*

5 *Id.* a 4784-85.

6 *Second Further NPRM* at 36, ¶74.

that equipment is not the most efficient for providing telecommunications services."[7] The Commission asks for comments on other permutations of the definition of the term "necessary" for collocation of competitor's equipment in ILEC facilities.[8] Each additional request for comments on how best to determine the requirements for collocation of competitor's equipment on ILEC premises adds nothing to the debate.

The Commission's invitation for further comment on the definition of the term "necessary" as applied to ILEC obligations to provide competitors with collocation space seems misguided. There is able instruction for the Commission on what collocation requirements ILECs must meet to satisfy Section 251(c)(6) of the 1996 Act.

In *GTE v. FCC*,[9] the court recognized that 1996 Act limits the scope and type of equipment ILECs must permit competitors to collocate in their facilities. In vacating the Commission's collocation regulations that defined the term necessary beyond the Supreme Court's decision in *Iowa Utilities*, the federal appeals court concluded that "a broader construction of necessary under Section 251(c)(6) might result in an unnecessary taking of [ILEC] private property."[10] The court held that the term necessary for collocation purposes, consistent with the requirements of Section 251(c)(6), means that a competitor has the right to collocate "equipment that is required or indispensable to achieve interconnection or access to unbundled network elements at the premises of the local exchange. The federal appeals court also determined that the Commission's requirement that ILECs provide space for CLEC cross-connects "imposes an obligation

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7 *Second Further NPRM* at 37, ¶77.

8 *Id.* at 77-83.

9 *GTE Service Corp v. FCC*, 205 F.3d 416 (D.C. Cir. 2000).

10 *Id.* at 423.

on LECs that has no apparent basis in the statute."[11] The federal appeals court also determined that paragraph 42 of the Commission's collocation Order permitted CLECs unprecedented authority to pick and choose where to collocate their equipment on ILEC property. In vacating this regulation, the federal appeals court stated that the Commission had failed to explain "why a competitor, as opposed to the LEC, should choose where to establish collocation on LEC property," and that the sweeping language appeared to once again "favor the LECs' competitors in ways that exceed what is necessary to achieve reasonable physical collocation and in ways that may result in unnecessary takings of LEC property."[12] Enforcement by the Commission of vacated collocation regulations that allow CLECs to collocate multi-function equipment and cross-connects on ILEC premises, would be inconsistent with the federal appeals court opinion. The federal appeals court opinion also rejected arguments that collocating equipment not required by Section 251(c)(6) was necessary because of alleged cost savings.[13]

The Commission's actions in this *NPRM* must comport with the clear directives from the federal appeals court. Any effort on the part of the Commission to expand the scope of the term "necessary" to increase the collocation obligations of ILECs would be inconsistent with the federal appeals court opinion. An ILEC need only provide a competitor with collocation that is necessary and indispensable for interconnection with and access to ILEC UNEs.

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11 *GTE Service Corp v. FCC*, 205 F.3d at 423.

12 *Id.* at 426.

13 *Id.*

The Commission's request for comments on "whether Section 251(c)(6) encompasses cross-connects between collocators"[14] also raises concerns of impermissible expansion of Commission regulations imposed upon ILECs. Clearly, the federal appeals court has answered this question. In assessing the question, the federal appeals court stated:

> One clear example of a problem that is raised by the breadth of *the Collocation Order's* interpretation of "necessary" is seen in the Commission's rule requiring LECs to allow collocating competitors to interconnect their equipment with other collocating carriers. [T]he Commission is almost cavalier in suggesting that cross-connects are efficient therefore justified under section 251(c)(6).[15]

In rejecting the Commission's overtly broad reading of Section 251(c)(6), the federal appeals court held:

> This will not do. The statute requires LECs to provide physical collocation of equipment as necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier and nothing more. As the Supreme Court made clear in *Iowa Utilities Board*, the FCC cannot reasonably blind itself to statutory terms in the name of efficiency. *Chevron* deference does not bow to such unbridled agency action.[16]

Consistent with Section 251(c)(6), the Commission cannot require ILECs to provide collocation space for competitors to collocate cross-connect equipment because such equipment is not "necessary" or indispensable for such carriers to interconnect with ILECs or for access to unbundled network elements. The federal appeals court decision provides further support that no matter how the Commission phrases the question, ILECs

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14 *Second Further NPRM* at 41, ¶88.

15 *GTE Service Corp v. FCC,* 205 F.3d at 423.

16 *Id.* at 423-424.

are not required to provide collocation space for equipment used by CLECs to cross-connect their facilities. ILECs are not required to permit collocation of any equipment that is not necessary and indispensable for interconnection and access to UNEs. The federal appeals court rejected the Commission's contention that cost savings from alleged efficiencies from collocation of multi-function equipment could justify the Commission's expansive reading of Section 251(c)(6). As the court reasoned, "It was precisely this kind of rationale, based on presumed cost savings, that the Supreme Court flatly rejected in *Iowa Utilities Board.*

The Commission seeks comments on the meaning of physical collocation under Section 251(c)(6) and whether the ILEC retains control over the assignment of unused space in ILEC facilities. Specifically, the Commission seeks comment on "whether the incumbent, as opposed to the requesting carrier, should select a requesting carrier's physical collocation space from among the unused space in the incumbent's premises."[17] Again, the federal appeals court opinion has answered this question. The court held:

> The FCC offers no good reason to explain why a competitor, as opposed to the LEC, should choose where to establish collocation on the ILEC's property; nor is there any good explanation of why LECs are forbidden from requiring competitors to use separate entrances to access their own equipment; nor is there any reasonable justification for the rule prohibiting LECs from requiring competitors to use separate or isolated rooms or floors.... The statute requires only that LECs reasonably provide space for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, nothing more." The sweeping language in paragraph 42 of the Collocation Order appears to favor the ILECs competitors ... in ways that may result in unnecessary takings of LEC property.

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17 *Second Further NPRM* at 43, ¶98.

> Once again, ... the FCC's interpretation diverges from any realistic meaning of the statute.[18]

The Commission should not adopt additional collocation regulations that create barriers to ILECs competing. ILECs, as a matter of law, may establish reasonable collocation requirements. There is no need for the Commission to adopt burdensome national space reservation regulations. The Commission has no authority to require minimum space requirements for collocated equipment. In addition, ILECs should be allowed more than the current 90 day provisioning interval. The Commission should not shorten the time-frame in which ILECs provide collocation. Moreover, the Commission should not impose burdensome collocation obligations involving access to ILEC premises for line-sharing or collocation in remote terminal facilities. Imposition of additional regulatory obligations on ILECs will only discourage competition generally and the deployment of advanced networks.

FIFTH FURTHER NOTICE NPRM
UNBUNDLED NETWORK ELEMENTS

The Commission seeks comments on whether ILEC deployment of new technologies and upgrades to existing networks requires "clarification of the Commission's local competition rules, particularly ... rules pertaining to access to unbundled transport, loops, and subloops."[19] Before the Commission can impose new unbundling obligations on ILECs, it must determine if the UNEs in question meet the requirements of what is necessary for competition establish by the courts consistent with

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18 *GTE v. FCC*, 205 F.3d at 426.

19 *Fifth Further NPRM* at 51, ¶118.

the requirements of Section 251(d)(2).[20] The Commission must undertake an impairment analysis to determine if additional unbundling is necessary for CLECs to compete. The Commission must also determine what impact additional unbundling obligations on ILECs would have on the deployment of advanced telecommunications services to all Americans. There is no evidence that CLECs are impaired in their ability to compete in the advanced services market without further unbundling of ILEC networks. The Commission has previously determined that the potential for monopoly of the last mile of the advanced services market does not exist.[21]

The Commission can answer the questions raised in the *Second Further NPRM* and the *Fifth Further NPRM* by following the mandates of prior court decisions. Otherwise, the Commission risks adopting regulations that exceed the requirements of the 1996 Act and the opinions of courts interpreting the Orders of the Commission.

Respectfully submitted,

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[20] 47 U.S.C. §251(d)(2).

[21] Advanced Service Report (Section 706), CC Docket No. 98-146 released Febuary 2, 1999.

CERTIFICATE OF SERVICE

I, Gail Talmadge, do hereby certify that on October 12, 2000 a copy of *Comments of the United States Telecom Association* in CC Docket Nos. 98-147 and 96-98, was hand-delivered to the persons on the attached service list.

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